Supreme Court, U.S.
FILED

95 16 48 JAN 29 1996

OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

BRIAN WECHSLER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

WILLIAM H. MURPHY, JR.
1007 North Calvert Street
Baltimore, Maryland 21202
(410) 539-6500

Attorney for Petitioner
Brian Wechsler

April 12, 1996

Washington, D.C. • THIEL PRESS • (202) 328-3286

340

QUESTIONS PRESENTED FOR REVIEW

A. Did Mr. Wechsler retain a reasonable expectation of privacy in his checked and locked luggage under the Fourth and Fourteenth Amendments to the United States Constitution by retaining his luggage key and baggage claim tickets, equivocating about whether he had checked luggage, and insisting that the agents not search the luggage without a warrant?

B. Before being searched, was Mr. Wechsler unlawfully detained in violation of the Fourth Amendment and Fourteenth Amendments to the United States Constitution when, as Mr. Wechsler was leaving the airport and entering a taxi, the agent thrust his hand in between Mr. Wechsler and the interior of the cab, displaying his badge of authority, told Mr. Wechsler he was a DEA agent and said he wished to ask him some questions?

PARTIES TO THE PROCEEDINGS

PETITIONER

BRIAN WECHSLER

RESPONDENT

COMMONWEALTH OF VIRGINIA

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
PERTINENT CONSTITUTIONAL PROVISIONS	2
STATEMENT OF THE CASE	3
STATEMENT OF THE FACTS	5
REASONS FOR GRANTING THE WRIT	11
CONCLUSION	25

APPENDICES:

Appendix A - Opinion, Court of Appeals of Virginia, #1661-93-4, dated April 11, 1995	1a
Appendix B - Order, Supreme Court of Virginia, #95-1220, dated October 30, 1995	3a

TABLE OF AUTHORITIES

Cases	Page
Commonwealth v. Holloway, 9 Va. App. 11, 384 S.E.2d 99	14, 18, 23
Florida v. Royer, 460 U.S.491 (1983)	19
Moss v. Commonwealth, 7 Va. App. 305, 307, 373 S.E.2d 170 (1988)	20
Reid v. Georgia, 448 U.S.438 (1980)	21, 24
Taylor v. Commonwealth, 6 Va. App. 384, 369 S.E.2d 423 (1988)	23
Terry v. Ohio, 392 U.S.1, 16 (1967)	18
United States v. Barry, 853 F.2d 1479 (8th Cir. 1988)	13
United States v. Goodina, 695 F.2d 78 (4th Cir. 1982)	19
United States v. Moskowitz, 883 F.2d 1142 (2nd Cir. 1989)	15
United States v. Oswald, 783 F.2d 663 (6th Cir. 1986)	11

United States v. Presler, 610 F.2d 1206 (4th Cir. 1979)..... 13

United States v. Sanders, 719 F.2d 882 (6th Cir. 1983)..... 12, 17

United States v. Taylor, 917 F.2d 1402 (6th Cir. 1990)..... 22

United States v. Wilson, 953 F.2d 116 (4th Cir. 1991)..... 19

Woodson v. Commonwealth, 14 Va. App. 787, 421 S.E.2d 1 (1992)..... 20

No. _____

In The

Supreme Court of the United States

October Term, 1995

BRIAN WECHSLER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

Petition For a Writ of Certiorari To The

Supreme Court of Virginia

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Virginia entered in this case on October 30, 1995.

OPINIONS BELOW

Petitioner Brian Wechsler's ("Mr. Wechsler's") conviction was affirmed in *Commonwealth v. Wechsler*, ___ Va. App.___, 455 S.E.2d 744 (#1661-93-4, April 11, 1995) (Appendix A); and Mr. Wechsler's petition for appeal to the Supreme Court of Virginia was denied by order dated October 30, 1995 (#951220) (Appendix B).

JURISDICTION

The judgment of the Supreme Court of Virginia denying Mr. Wechsler's petition for appeal was entered October 30, 1995; and the jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution, which says in pertinent part: "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated;" and the Fourteenth Amendment to the United States Constitution, which says in pertinent part: "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Brian Wechsler was arrested at Washington National Airport and charged with possession of marijuana with intent to distribute in violation of Virginia Code § 18.2 - 248.1 and transportation of marijuana into the Commonwealth in violation of Virginia Code § 18.2 - 248.01. On March 18, 1993, a pretrial hearing was held in the Circuit Court of Arlington County on Mr. Wechsler's motion to suppress the evidence seized from his luggage. Mr. Wechsler argued, *inter alia*, that he had been illegally seized in violation of the Fourth and Fourteenth Amendments of the United States Constitution and that the warrantless search of his luggage violated the Fourth and Fourteenth Amendments of the United States Constitution. The Circuit Court denied Mr. Wechsler's motion to suppress, holding, *inter alia*, that he had been legally seized and that he had abandoned his luggage. (J.A.1 124 - 25).[1] After hearing argument on Mr. Wechsler's motion for reconsideration on July

[1]Record of citations are to the Joint Appendix ("J.A.") originally filed in the Court of Appeals of Virginia.

16, 1993, the Circuit Court denied that motion. The court did, however, observe that "[i]t's a troublesome case" and that "[a] lot of judges could disagree with that result reasonably." (J.A.150, 166).

On July 26, 1993, Mr. Wechsler entered a conditional plea of guilty on both charges in the Circuit Court of Arlington County. Mr. Wechsler was sentenced on each charge to a term of imprisonment of twenty years, five years were suspended, a six - month driver's license suspension, and a suspended fine of $100.00. The sentences were imposed concurrently. The Circuit Court continued Mr. Wechsler's bond pending appeal. Mr. Wechsler timely filed his Notice of Appeal in the Court of Appeals on August 23, 1993.

Mr. Wechsler's petition for appeal to the Court of Appeals was granted without oral argument. Briefs raising these issues were filed and oral argument on these issues was heard before Judges Willis, Bray and Fitzpatrick. Mr. Wechsler's conviction was affirmed in a published decision written by Judge Bray, filed on April 11, 1995. On May 10, 1995, Mr. Wechsler's bond pending appeal was revoked and he is

currently serving his sentence at the Coffeewood Correctional Center in Mitchells, Virginia.

Mr. Wechsler's petition for rehearing and for rehearing *en banc* was denied by the Court of Appeals on June 2, 1995; and his petition for appeal to the Supreme Court of Virginia, which raised only the search issue, was denied on August 29, 1995. This petition for writ of certiorari was filed in this court on January 29, 1996.

STATEMENT OF THE FACTS

On the morning of November 13, 1992, a law enforcement officer assigned to the Dallas - Fort Worth Airport telephoned Drug Enforcement ("DEA") Agent Douglas Kahn and reported information regarding an airline passenger. According to the Dallas - Fort Worth officer, a young black male named Brian Wechsler had purchased a one - way ticket from Tucson, Arizona to Washington National Airport. They were suspicious of Mr. Wechsler because he reportedly made his reservations by phone about one hour prior to the scheduled boarding time. Shortly before departure, he arrived at the airport, paid cash for his ticket and checked two pieces of luggage. (J.A. 20 - 21). The officer at the Dallas - Fort Worth

Airport reportedly observed a black male who may have been the above - described person and who appeared nervous during the layover in Dallas - Fort Worth. (J.A. 20 - 21).

Based solely upon this information, a team of DEA agents proceeded to Washington National Airport. Agents Kahn and Jacobson stationed themselves at the gate and observed a young black male, Mr. Wechsler, deplaning with two carry - on bags. (J.A. 80). According to Agent Kahn, when Wechsler noticed the agents -- two casually dressed Caucasian males -- staring at him, he looked away, and he continued walking in the direction of the baggage carousel. (J.A. 24 - 25, 80). The agents then followed Mr. Wechsler. Mr. Wechsler stopped briefly in the vicinity of the baggage carousel and, according to Agent Kahn, again looked at the plainclothed agents as they followed him. (J.A. 27). Mr. Wechsler went to a pay phone and attempted to make a call; he then exited the airport and proceeded to a taxi cab stand. (J.A 28 - 29).

When it was his turn, Mr. Wechsler opened the taxi cab door and placed one bag in the taxi. As Mr. Wechsler was entering, Agent Kahn thrust his hand in between Mr. Wechsler and the interior of the cab, displaying his badge of authority.

(J.A. 106 - 107). Agent Kahn told Mr. Wechsler that he was a DEA agent and wished to ask him some questions. (J.A. 30, 106). In response to the agent's curbside interrogation, Mr. Wechsler said he had discarded his airline ticket and denied having any luggage other than his two carry - on bags. Mr. Wechsler also produced a valid Maryland driver's license in his true name. When asked whether he was in possession of any narcotics or large amounts of money, Mr. Wechsler stated that he was not.

Agent Kahn then asked to search Mr. Wechsler's carry - on bags. Once again, Mr. Wechsler acquiesced. (J.A. 31 - 32). Examination of the bags produced Mr. Wechsler's airline ticket, two baggage claim tickets, two pipes, and some clearly - labeled, commercially - sold "Smoking Herb." (J.A. 40, 60 - 61). When Agent Jacobson found the airline ticket and the baggage claim tickets, at that point Agent Jacobson asked Mr. Wechsler, "I didn't think you had checked baggage." Mr. Wechsler said, "Well, I guess I do." (J.A. 36, 84) (emphasis added). Both the airline ticket and the matching claim tickets carried the name Brian Wechsler -- Mr. Wechsler was traveling under his own name. (J.A. 57). At that point, Mr. Wechsler

indicated that he wanted to leave. (J.A. 84). The agents then formally detained Mr. Wechsler ostensibly in order to field test the commercially packaged "smoking herb" which the agent did not even bother to smell. (J.A. 36, 60).[2]

The Circuit Court held that it was unnecessary to consider the lawfulness of the detention or the subsequent interrogation because Mr. Wechsler had already abandoned his luggage by this time. The following section describes the post-detention events which, nonetheless, troubled the Circuit Court. (J.A. 124, 127).

The agents took Mr. Wechsler to the airport's police substation and placed him in an interview room. The agents searched Mr. Wechsler's person and field tested the "Smoking Herb." The field test and further observation conclusively proved that the "Smoking Herb" was in fact a smoking herb and not marijuana. (J.A. 34 - 37). Mr.

---

[2]The Commonwealth qualified Agent Kahn as an expert in narcotics and he testified that the "smoking herb" could easily nave been distinguished from marijuana upon an olfactory examination. (J.A. 16, 60).

Wechsler was not released. Instead, Agent Kahn left the interview room and contacted an Assistant United States Attorney for instructions.

Meanwhile, Agent Jacobson, without giving Miranda warnings, continued interrogating Mr. Wechsler regarding the baggage claim tickets. (J.A. 38 - 42, 86). Agent Jacobson asked Mr. Wechsler "if he did have luggage, he said no, he didn't have any baggage. I said -- right after I asked him that I said what does your baggage look like, and he said it's two soft brown leather bags, I said well, then you do have luggage. He indicated no, I don't." (J.A. 86). After approximately twenty minutes, Agent Kahn returned to the interview room.

Agent Kahn then advised Mr. Wechsler of his *Miranda* rights. Mr. Wechsler stated that he wanted to consult with an attorney before he answered any questions. (J.A. 87, 9293). The agents disregarded this request. The luggage which corresponded with Mr. Wechsler's claim tickets, and also bore his name, was found and brought to the room where Mr. Wechsler was being detained. Agent Kahn testified that:

> The first thing Mr. Wechsler - - he said before any questions were asked he said that's not my bags, those aren't my bags, something to that effect. At that point we asked Mr. Wechsler, would you mind if - - would you consent to us searching these bags. *He was like no. I don't want you to look in them. Then he said something to the effect of I don't want you to search them without a warrant.*. And then we asked him again, are these your bags. He said no. They're not my bags, I've never seen them before. Something to that effect. At which time we took the bags, removed the bags from the interview room.

Agent Kahn left the interview room to advise the Assistant United States Attorney, who had remained on the telephone, how Mr. Wechsler responded to these questions. (J.A. 74). Based upon this information, the assistant United States Attorney advised Agent Kahn to go ahead and open Mr. Wechsler's luggage without a warrant. (J.A. 88). The agents then proceeded to open the luggage by utilizing a key they had found hanging from one of Mr. Wechsler's carry-on bags. (J.A. 65, 89). One of the bags contained approximately 19 pounds of marijuana. At that point, Agent Kahn readvised Mr. Wechsler of his *Miranda* rights.

REASONS FOR GRANTING THE WRIT

A. The warrantless search of the luggage in which Mr. Wechsler retained a reasonable expectation of privacy violated the Fourth and Fourteenth Amendments of the United States Constitution.

Contrary to the weight of authority, the courts below concluded that Mr. Wechsler exhibited an intent to abandon his luggage merely by leaving the airport before retrieving his luggage from the airlines. The Circuit Court and the Court of Appeals held that this constituted a physical relinquishment of Mr. Wechsler's luggage. Courts outside the Commonwealth of Virginia have considered this same issue and have observed, to the contrary, that "[W]hen one leaves a suitcase in an airport baggage claim area, he leaves it in a place where there is normally some measure of security. It is reasonable to expect that checked luggage will be locked up, if not claimed within a reasonable time, and will be kept safe until the person holding the claim check comes to retrieve it." *United States v. Oswald*, 783 F.2d 663, 667 (6th Cir. 1986). Having possession of the claim tickets in his carry - on bag, along with the key to his checked luggage, Mr. Wechsler would, as the Circuit Court acknowledged, be able to return to the airport and take direct

control of his luggage later that day or the following day. (J.A. 123).

United States v. Sanders, 719 F.2d 882 (6th Cir. 1983), is instructive because it involved facts remarkably similar to those of the instant case. The defendant in *Sanders* aroused the suspicions of DEA agents during a layover in the Atlanta airport. *Id.* at 883. Agents in the Memphis airport, who had been notified of the investigation, observed the defendant walk past the baggage claim without claiming her suitcase and proceed outside where she entered a taxi cab. The agents asked the defendant to get out of the taxi. *Id.* at 884. Soon thereafter, the agents arrested the defendant and retrieved her suitcase. *Id.* at 884.

While the defendant refused to consent to a search, when asked whether the suitcase was hers, she responded, "It might be, and it might not." *Id.* at 885. Following a dog sniff, the suitcase was searched pursuant to a warrant and found to contain drugs. The government argued that the propriety of the stop was immaterial as the defendant abandoned her suitcase when she failed to claim it. *Id.* at 885. The *Sanders* court stated that leaving the airport without claiming one's luggage does not

constitute abandonment. *Id.* at 885 - 86. Moreover, the court held that, despite her equivocal assertion of ownership, the defendant never abandoned her suitcase.[3] *Id.* at 886.

Mr. Wechsler had likewise entrusted his luggage to the airlines' baggage claim cage, creating a bailor/bailee relationship, and it cannot be concluded that he intended to abandon his luggage, or relinquish possession of it, by leaving the airport. Mr. Wechsler's luggage was locked, and he kept the key in his possession. Having also retained his baggage claim tickets, Mr. Wechsler retained the legal right to return later to take direct control over his luggage. These acts are an effective expression of Mr. Wechsler's expectation of privacy. *United States v. Barry*, 853 F.2d 1479, 1482 (8th Cir. 1988). *See also United States v. Presler*, 610 F.2d 1206, 1213 - 14 (4th Cir. 1979) (reasonable expectation of privacy in briefcases entrusted to another where defendant locked briefcases and retained key).

The question therefore, is whether the Commonwealth of Virginia should stand alone and countenance the warrantless searching of luggage based on an abandonment theory when the

---

[3]She had paid cash for a one - way ticket to Memphis, had made reservations on two different flights, and had used fictitious call - back numbers and addresses. In addition, the defendant's checked suitcase smelled heavily of perfume, allegedly used by drug couriers to mask the odor of drugs.

luggage is locked and entrusted to an airline with the owner's identity properly displayed on the outside of the luggage, and the owner, for whatever reason, departs the airport in possession of the keys and claim tickets. Do those travelers who entrust their luggage to baggage claim services have an expectation of privacy no greater than if they had left their luggage unattended in an airport restroom simply because their destination is an airport in the Commonwealth of Virginia?

Mr. Wechsler asserts that the evidence adduced clearly shows that he never surrendered his reasonable expectation of privacy in his checked and locked luggage. The test for abandoned property accepted by the lower courts is as follows:

> A person's "[I]intent to retain a reasonable expectation of privacy" determines whether the property has been abandoned so as to permit its seizure without a warrant. Whether a person intends to retain a reasonable expectation of privacy in property is to be determined by objective standards. Such an intent may be inferred from words, acts, *and other objective facts.*

Commonwealth v. Holloway, 9 Va. App. 11, 18, 384 S.E.2d 99, 103 - 104 (1989)(citations omitted)(emphasis added). The objective facts in this case do not support the conclusion that Mr. Wechsler intended to abandon his luggage; rather, they are

consistent with an intent to retain a reasonable expectation of privacy in the luggage. These objective facts can be summarized as follows: (1) Mr. Wechsler was traveling under his real name and his luggage bore his real name; (2) Mr. Wechsler retained the key to his locked luggage; (3) Mr. Wechsler retained his baggage claim tickets; (4) Mr. Wechsler acknowledged that he had checked luggage; and (5) Mr. Wechsler refused to consent to a search of his luggage and insisted that the agents first obtain a warrant.

The evidence is anything but clear that Mr. Wechsler abandoned his checked and locked luggage. The one thing that is clear is that Mr. Wechsler told the agents that he did not want them to search his luggage without a warrant. (J.A. 42). The Court of Appeals, in finding that Mr. Wechsler voluntarily abandoned his luggage, overlooked this important and undisputed fact.

This is because the lower courts incorrectly determined that Mr. Wechsler had abandoned his luggage while en route to the police sub - station and failed to consider subsequent events. In determining whether property has been abandoned, "the relevant question . . . is intent *at the time of the search.*" *United*

States v. Moskowitz, 883 F.2d 1142, 1148 (2nd Cir. 1989) (emphasis added). Although, at first, Mr. Wechsler denied checking any luggage, prior to the warrantless search he admitted having done so. Moreover, at the time Mr. Wechsler's luggage was searched, he specifically stated that he did not consent to the search in the absence of a warrant. Any doubt as to whether he had abandoned his luggage was laid to rest when he refused to consent to a search of his luggage and insisted on a search warrant. This affirmative, unequivocal request that the agents obtain a warrant prior to searching the luggage cannot be ignored.[4] It is submitted that this Court should grant Mr. Wechsler's petition to consider whether Mr. Wechsler's assertion in combination with all of the other circumstances, demonstrates that he had a reasonable expectation of privacy in the luggage at the time of the search.

Mr. Wechsler's equivocal and contradictory denial of ownership, characterized by the Circuit Court as "mixed messages," may not be construed as abandonment. (J.A.163).

---

[4] The circuit court held that abandonment occurred during Mr. Wechsler's curb - side questioning. The circuit court's holding is erroneous because the last thing Mr. Wechsler said prior to being arrested and taken to the police sub - station was an acknowledgment that he did have checked luggage. (J.A. 36, 55, 85, 125).

See *United States v. Sanders*, 719 F.2d 882, 886 (6th Cir. 1983). While it is true that Mr. Wechsler at first denied ownership of any luggage, it quickly became obvious that he in fact had checked luggage when Agent Jacobson found two baggage claim tickets in Mr. Wechsler's hand - carried baggage that bore his true name. When confronted, Mr. Wechsler corrected his prior statement and admitted that he did, in fact, have checked luggage. This tangible evidence of ownership of luggage, along with his specific request that the agents obtain a search warrant prior to opening the luggage, was sufficient to overcome Mr. Wechsler's denial of ownership and any question of abandonment.

Despite the agents' efforts to bait Mr. Wechsler into abandoning his luggage, the totality of the circumstances demonstrate that Mr. Wechsler asserted an ownership interest in the luggage. Concerning Mr. Wechsler's refusal to consent to a search and demand a warrant, what more can a citizen do to demonstrate an expectation of privacy in his luggage? The search of Mr. Wechsler's luggage was illegal and the evidence should have been suppressed.

B. Before being searched, Mr. Wechsler was unlawfully detained in violation of the Fourth Amendment when, as Mr. Wechsler was leaving the airport and entering a taxi, the agent thrust his hand in between Mr. Wechsler and the interior of the cab, displaying his badge of authority, told Mr. Wechsler he was a DEA agent and said he wished to ask him some questions.

The stop of Mr. Wechsler violated the Fourth and Fourteenth Amendments and, therefore, any evidence obtained pursuant thereto should have been suppressed:

> Abandonment must be "truly voluntary and not merely the product of police misconduct," *United States v. Roman*, 849 F.2d 920, 923 (5th Cir. 1988). Therefore, a verbal disclaimer of an interest in a suitcase obtained from the defendant by the police during an illegal arrest, cannot be considered as *evidence of abandonment. Commonwealth v. Holloway*, 9 Va. App. 11, 19, 384 S.E.2d 99, 103 - 104 (1989) (citation omitted and emphasis added).

Mr. Wechsler was seized at the taxi within the meaning of the Fourth Amendment because "[w]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry v. Ohio*, 392 U.S.1, 16 (1967). A "seizure" for purposes of the Fourth Amendment occurs when the "circumstances . . . amount to a show of official authority such that 'a reasonable person would have believed that he was

not free to leave.'" *Florida v. Royer*, 460 U.S. 491, 502 (1983) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

The confrontation here involved more than a verbal request to halt - - Agent Kahn used his arm to physically obstruct Mr. Wechsler from entering the taxi cab, where he had already placed his carry - on luggage. (J.A. 106 - 107). No reasonable person would have believed themselves free to leave at this point. In *United States v. Goodina*, 695 F.2d 78 (4th Cir. 1982), another airport stop case, the Fourth Circuit held that a less forceful encounter amounted to a "seizure." There, the law enforcement officers also approached the defendant outside of Washington National Airport. Regarding the stop, the court found:

> Though not accompanied by force and carried out in a polite way, it was then prolonged through a preliminary request for identification which yielded nothing suspicious, through a direct inquiry of criminal culpability, into a request for permission to search after culpability had been denied. *Id.* at 82.

Based upon these facts, the district court's finding that a seizure had occurred was upheld. *Id. See also United States v. Wilson*, 953 F.2d 116, 123 (4th Cir. 1991) (holding that even though the

officer told the defendant he was free to leave, the officer's persistent questioning after the defendant attempted to cut - off conversation constituted a seizure).

Physical contact is not required in order for a restriction of movement to constitute a "seizure." In *Woodson v. Commonwealth*, 14 Va. App. 787, 421 S.E.2d 1 (1992), the police detective approached the defendant's parked car carrying his gun at his side. The detective identified himself as a police officer and said, "put your hands where I can see them." 149 Va. App. at 789, 421 S.E.2d at 2. This Court held that the detective's command, coupled with his announcement of authority, was a seizure because it "effectively prevented the occupants from leaving, thereby restricting their freedom of movement." 14 Va. App. at 791, 421 S.E.2d at 3. *See also Moss v. Commonwealth*, 7 Va. App. 305, 307, 373 S.E.2d 170, 172 (1988) (holding that a seizure occurred when the police officer stepped out from behind bushes and shined his flashlight at the defendant).

In Mr. Wechsler's case, the agents did not merely approach Mr. Wechsler and ask him if he would be willing to answer some questions. Agent Kahn actually restrained Mr.

Wechsler's freedom of movement and prevented him from entering the taxi cab. The inescapable conclusion is that the agents seized Mr. Wechsler.

To be consistent with the Fourth Amendment, any curtailment of a person's liberty by the police must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity. *Reid v. Georgia*, 448 U.S. 438, 440 (1980). The agents began to surveil Mr. Wechsler because he was a young black male who allegedly appeared nervous and had paid cash for a one-way ticket shortly before departure. The additional factors relied upon to justify stopping Mr. Wechsler were Mr. Wechsler's brief eye contact with the plain - clothed agents and his allegedly suspicious behavior near the baggage carousel. The information and observations were insufficient to give rise to a reasonable and articulable suspicion that Mr. Wechsler was engaged in criminal activity.

The primary characteristics relied upon by the agents to justify stopping Mr. Wechsler have been widely rejected by the courts. Nothing can be made of the fact that Mr. Wechsler purchased his airline ticket with cash. Agent Kahn testified that

drug couriers typically purchase airline tickets for cash so as not to leave a paper trail. (J.A. 23). The ticket purchase in this case was endowed with no such significance. Agent Kahn acknowledged that those who, like Mr. Wechsler, travel using their own names do not conceal their presence on a flight through cash ticket purchases. (J.A. 64). Regarding the same set of facts, the court in *United States v. Taylor*, 917 F.2d 1402 (6th Cir. 1990), observed:

> [D]rug couriers benefit from the anonymity of cash transactions. Here, however, Taylor [the defendant] purchased the ticket in his own name. *Certainly* purchasing a ticket under one's fecal name is uncharacteristic behavior for a *drug courier*. This casts further doubt not only on the officers' basis for stopping Taylor, but also on the reliability of the drug courier profile. *Id.* at 1410 n.11 (emphasis added).

This Court should discount this factor since Agent Kahn had no information that Mr. Wechsler was traveling under an alias and since he learned the converse was true prior to searching Mr. Wechsler's carry - on luggage. Mr. Wechsler's reported nervousness in the Dallas - Fort Worth Airport, another factor relied upon by the agents, is entitled to no weight. In *United States v. Taylor*, the agents concluded that the defendant fit the so - called "drug courier" profile because he appeared nervous

and did not stop at the baggage claim area. *Id.* at 1409. The court held that

> [T]his determination was inappropriate, because observing an individual walking quickly through an airport or nervously looking around is insufficient to warrant a search and seizure. *Id.* See also *United States v. Andrews*, 600 F.2d 563, 566 (6th Cir. 1979) (nervousness in an airport is entirely consistent with innocent behavior).

Eye contact with surveilling law enforcement officers adds nothing to the supposition that an individual is engaged in criminal activity. In *Taylor v. Commonwealth*, 6 Va. App. 384, 369 S.E.2d 423 (1988), the Virginia Court of Appeals held that the fact that the defendants "cut their eyes" in the officer's direction could not contribute to a reasonable suspicion of criminality. 6 Va. App. at 389, 369 S.E.2d at 425. The court reasoned that:

> [T]he presence of an unidentified motor vehicle alternately tracking the defendants' vehicle from one side to the other for a period of four to five miles on an interstate highway could explain why the defendants, concerned for their own safety, looked in the officer's direction.

6 Va. App. at 389, 369 S.E.2d at 425. See also *Commonwealth v. Holloway*, 9 Va. App. at 16, 384 S.E.2d at 102 ("The mere

fact that travelers may look at each another does not justify a suspicion of wrongdoing."). This same reasoning applies in the instant case. Innocent travelers are likely to take notice of unidentified individuals who are staring at and following them. Here, it is not surprising that Mr. Wechsler, a young black male, noticed the two white males staring at him and following him from the gate to the baggage claim area.

The "slender reed" which remains and which cannot support this stop is the agents' surveillance of Mr. Wechsler once he reached the baggage claim area. According to the agents, Mr. Wechsler waited in the vicinity of the baggage carousel and, when the baggage from his flight was not quickly forthcoming, he attempted to make a phone call. Mr. Wechsler then exited the airport and hired a cab without waiting for the baggage aboard his flight to reach the carrousel. This conduct certainly fails to rise above an "inchoate and unparticularized suspicion or 'hunch.'" *Reid v. Georgia*, 448 U.S. 438, 441 (1980) (quoting *Terry v. Ohio*, 392 U.S. at 27). Mr. Wechsler's behavior was not only lawful, it was consistent with the type of hurried and impatient behavior of lawful airline travelers who are in a rush. Without some evidence connecting Mr. Wechsler to drug

transportation, there was simply no basis for a suspicion that Mr. Wechsler was involved in criminal activity.

CONCLUSION

WHEREFORE, based on these facts and arguments, Mr. Wechsler prays that this Court grant his petition for writ of certiorari to consider the unlawfulness of his accosting and the subsequent warrantless search of his luggage.

Respectfully submitted,

William H. Murphy, Jr.
Counsel of Record
1007 North Calvert Street
Baltimore, Maryland 21202
(410) 539-6500

Attorney for Petitioner
Brian Wechsler

APPENDIX A

VIRGINIA:

In the Court of Appeals of Virginia on Tuesday *the* 11th *day of* April, 1995.

Brian Wechsler, s/k/a
Brian Weschler, Appellant,

against Record No. 1661-93-4
Circuit Court Nos. CR93-197 and CR93-388

Commonwealth of Virginia, Appellee.

From the Circuit Court of Arlington County

Before Judges Willis, Bray and Fitzpatrick

For reasons stated in writing and filed with the record, the Court is of opinion that there is no error in the judgments appealed from. Accordingly, the judgments are affirmed. The appellant shall pay to the Commonwealth of Virginia thirty dollars damages.

This order shall be certified to the trial court.

A Copy,

Teste:

Richard R. James, Clerk

By: /s/ Cynthia L. McCoy

Deputy Clerk

Appellee's Costs:

Attorney's fee	$ 50.00
Appellee's brief	61.60

Teste: /s/ Cynthia L. McCoy

Acting Clerk

APPENDIX B

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 30th *day of* October, 1995.

Brian Wechsler, Appellant,

against Record No. 951220
Court of Appeals No. 1661-93-4

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

Justice Koontz took no part in the consideration of this case.

A Copy,

Teste:

David B. Beach, Clerk

By:

Deputy Clerk

Supreme Court, U.S.
FILED
JAN 29 1996
CLERK

(2)

No. 95-1648

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

BRIAN WECHSLER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

WILLIAM H. MURPHY, JR.
1007 North Calvert Street
Baltimore, Maryland 21202
(410) 539-6500
Attorney for Petitioner
Brian Wechsler

June 5, 1996

Washington, D.C. • THIEL PRESS • (202) 328-3286

29pp

TABLE OF CONTENTS

Page

APPENDICES:

Appendix C - Transcript excerpt of Motion to Suppress hearing - March 18, 1993 ..... 1a

Appendix D - Order denying Motion to Suppress, dated April 1, 1993..... 18a

Appendix E - Transcript excerpt of Motion to Reconsider hearing - July 16, 1993..... 19a

Appendix F - Order denying Motion to Reconsider, dated August 10, 1993..... 26a

APPENDIX C

Excerpt of Motion to Suppress Hearing

March 18, 1993

reasonable belief in the officers' minds that they know it's his property, for purposes of a warrant issue.

MS. LAIR: Well, the officers undoubtedly knew that the bags were his. I mean everything pointed to the bags being his.

THE COURT: It's overpowering that the bags are his. There's no question the bags are his.

MS. LAIR: The question is, not what the officers believed but whether once he has a possessory interest in it and a privacy right in those bags, whether or not he gives that up. And that's what he did.

THE COURT: All right, let me hear from Mr. Zwerling.

MR. ZWERLING: Judge, the Holloway case which is the one case in Virginia, the defendant was asked -- I think it was a train -- they find three bags above the defendant, a gray one in which they find money, and two brown ones that

nobody claims. And they're asked, who do those bags belong to? We don't know. We don't know.

That's pretty much the same as they're not my bags. That wound up in suppression. I would point out, Your Honor, that when they left -- when they detained him, not when they put the hand in front of him, but when they stopped him and said you're coming with us, you're not free to leave -- I think the Court needs to understand the credibility issue to some extent.

They -- Officer Kahn said he wasn't sure until he field tested that substance that it wasn't marijuana.

THE COURT: And then you had him smell the bag and he immediately said no, it's not marijuana.

MR. ZWERLING: That's right, and if he had any doubts in his mind about whether it was marijuana, wasn't just looking for a hook, something cute to do something with, he would have smelled it right then and there. That wasn't the reason that Mr. Wechsler was taken down, that's not why he was detained.

He was detained for other reasons and that was to pursue their investigation, whether or not they had enough in

the quote, eyes of the Court is one thing, but Doug Kahn clearly couldn't think that they had enough because he had to make this thing about I thought it was marijuana up. I submit that was made up.

But the point is this: The vast majority of what the government is relying on took place after the man was in custody and either hadn't been Mirandized or had exercised his rights. And this Court should give no credence to that to help the government out, the Commonwealth out on this.

They should not be able to profit by anything that he was tricked into saying or doing down at that station prior to being Mirandized and yet while in custody, or subsequent to asking for a warrant. That is just fundamentally unfair; it strikes at the very liberties for which the Constitution and the Bill of Rights were enacted.

And that has got to be discouraged. If this Court does not suppress it will not be discouraged, it will be routine, because it will be approved, it will now be approved conduct. I don't think that's a conduct that should be approved, especially under the facts where they knew whose bag it was, it had his name on it.

If the Court will look at I think 2C, 2B - -

THE COURT: Mr. Zwerling, I don't know how many times I can say it. Everybody knew whose bags they were.

MR. ZWERLING: So as to the standing

--- I don't know if I need to address that -- the bag has his name on it.

THE COURT: Oh, I think you can keep standing even when you lie. I don't think lying forfeits property rights or standing.

MR. ZWERLING: Everything that he did, Your Honor, that created a lie -- when he lied to them and said they're not my bags they knew it was a lie. And that might go to help them show that he had guilty knowledge, help them with probable cause, help them with reasonable suspicion. But not help them do away with a requirement for a warrant.

That it doesn't do, because they never believed nor would any reasonable person believe the false exculpatories that this man gave after he was in custody and while he was being either interrogated directly or by being confronted with things which would make him likely to make statements.

And if the Court will look at the law in Virginia, the Holloway case, 9 Virginia --

THE COURT: I want to read that before I rule.

MR. ZWERLING: -- it says "every disclaimer of ownership of personalty, however, does not conclusively establish an intent to relinquish one's expectations to privacy."

That's really what this Court is being asked to decide. Did Mr. Wechsler in the Court's view on the facts here intend to relinquish is expectation of privacy of those bags. That's the test, that's the test for abandonment. Clearly he did not, I submit. He said get a warrant; I don't want you in there; can I go; everything he could. He just couldn't come out once he was in custody and confess that yes, when you find the marijuana in there it's mine, those are my bags. He just couldn't do that.

And he shouldn't be required to have to do that. He doesn't understand Simmons. He doesn't understand Edwards, that if they question him after he invokes his rights

they can't use it against him later on. He doesn't know that. He can't be required to know that.

That's all I have.

THE COURT: Mr. Zwerling, recognizing it's not really the issue, to what extent does the theory of inevitable discovery touch here in any way that has any persuasive weight?

MR. ZWERLING: I don't think it has any in this case. First of all, I don't think there's probable cause. Second of all, they were not -- if the Court reads Williams or any of those other cases, they were in the process of finding the evidence, and that's why it was inevitable.

THE COURT: But let's assume that Kahn and the other agent, Jacobsen, say to him, you're free to go but the bags stay here.

MR. ZWERLING: And then did what, then went --

THE COURT: And went down and got a warrant.

MR. ZWERLING: And then if they -- well, we don't know what they would have done. That's number one.

THE COURT: He testified that he had an open mind and he was going to go one way or the other depending on the answer.

MR. ZWERLING: No, he said -- all -- he admitted all in his mind he had was a suspicion. He never said he thought he had probable cause.

THE COURT: Well, that doesn't govern what -- the total circumstances are such that if this man when Kahn asked him the last time whether it's his bag or not says one way or the other, including I refuse to answer, but if it's yes, the implication is clear in my mind and I accept Kahn's credibility at face value for everything he said he was motivated by and what he did.

He says we then have to decide whether we get a warrant or not. Well, let's assume that's the choice that faces them. This man, allow him to go, keep the bags, we've got his marijuana.

MR. ZWERLING: Well, number one, then deciding whether to get a warrant --

THE COURT: You can attest the validity of the warrant, a reasonable basis for it and everything else.

MR. ZWERLING: That's number one. Number two, you would have the presumptions of the magistrate, you would have the process that the Constitution requires. And in Sigora (phonetic) and in all the other cases really, Whitehorn, where you have inevitable discovery decided, the police -- they did something wrong. In Sigora they went in and secured the apartment from the inside and saw things in plain view while people were getting a warrant. Then they came back with the warrant and they found all this stuff anew, and other stuff. And the Supreme Court said well, look, what they found inside had no effect. They didn't use what they found to bolster the search warrant affidavit or anything else, so put this aside and look at what happened and determine whether they would have found it inevitably because they went and they got the warrant and did everything right.

In Whitehorn it was the same thing.

THE COURT: I understand, I'm misapplying -- the word discovery is really the key to inevitable discovery, you were going to find it anyhow. Here there's no finding issue, it's a question of opening it.

MR. ZWERLING: That's right, and they disregarded the requirement of the Fourth Amendment to get a warrant. And although there have been lots of exceptions that have grown up and almost swallowed the rule, the Constitution still says -- and the case law say this -- warrantless searches are per se unreasonable except for a limited group of exceptions. And if in a case like this we let -- well, good cops, good leads probably would have gotten it anyway -- swallow the warrant requirement, we don't have a warrant requirement, I submit.

If it's to have any validity and vitality it's for the Courts to protect it. It is a sick child, I admit, but it needs to be protected by the Courts.

THE COURT: Let me see Holloway, please.

Take a break, it'll take me at least a couple of minutes to read this. Counsel are free to take a stretch.

(Pause to review documents.)

THE COURT: Let me ask counsel a question. Commonwealth -- Holloway is helpful, but Judge Tidy (phonetic) from Henrico made certain fact-findings in that including he didn't accept the credibility of the agent who

somehow knew things were happening three hours before they happened.

And there was no tying of the suspect in Holloway to the alleged suspicious change of trains. Or the timing of payment or any of these indicia supposedly raising the suspicion of a drug courier.

But aside from all that specific factual information from Holloway, on page eighteen of the photocopy given to me it says the determination of abandonment has two particularly important factors. One is denial of ownership and two is physical relinquishment of the property.

Didn't this defendant relinquish the property when he went to the cab?

MR. ZWERLING: No, Your Honor. Because he was in a bail position. It's not like he left it on the sidewalk.

THE COURT: Well, that's part of the case law they analyze there, if somebody leaves a car for two or three hours in an unusual place, not a parking lot.

MR. ZWERLING: Right.

THE COURT: And they make the point at page nineteen if you walk away from your luggage in an airport you haven't abandoned it. But isn't it clear that this defendant was intending to get in that cab and leave the airport because he had seen who was looking at him?

MR. ZWERLING: That is a conclusion the Court could make.

THE COURT: And I do.

MR.ZWERLING: He was going to come back later --

THE COURT: I factually find that when he got off that plane and he started looking at these two agents he decided that he had a problem with that luggage, and therefore he got to that cab to get out of there.

MR. ZWERLING: That's right, and come back -- I don't think -- I mean it had his name on it, Judge.

THE COURT: Oh, he could come back and get it later.

MR. ZWERLING: Right, and I think that with his name on the luggage, if he left it there forever it would be opened and traced to him. So I think the fair conclusion is that he was not going to pick it up in the presence of those officers,

he might wait until their shift ended, come back in four or five hours, and then with his stubs retrieve it before --

THE COURT: Or have somebody else bring the stubs back.

MR. ZWERLING: Exactly. But I don't think that a fair reading would be that he had abandoned it as if he had left it on the sidewalk and was not coming back, and it was in a bailor or bailee position just like as if he had left his car at a lot, and he'd gone from the airport to the car, saw the police and then went back and got into a cab. He didn't abandon it, he just wasn't going to pick it up at that point in time.

He didn't give up his expectation of privacy in that as to the world.

THE COURT: It's a troublesome case, particularly when you have the prosecutor sitting on the phone advising the officers and what is going on in the flow of information, but having found Kahn to be credible and accepting what he claims to be his motivation and his state of mind as he went, I'm going to deny the motion to suppress relying on the language from Holloway that I was just talking about.

I find that when the defendant went to the cab he had ID'd those two narc or DEA people, whatever you want to call them. He knew that they were looking at him. He went to the cab to leave the area. The relinquishment of the luggage occurred when he went to the cab.

There follow after that subsequent disclaimers of ownership of the property and he thereby surrendered his expectation of privacy in the property even before they get downstairs and question him in the substation which one might argue is an illegal custodial interrogation and therefore his express abandonment or denial of ownership cannot be used against him because it would be intertwined with illegal police activity.

But I find his relinquishment occurs when he gets into the cab or tries to get into the cab, having identified the narcotics officers. His disclaimer starts immediately after they start questioning him in a voluntary exchange of information out by the cab.

MR. ZWERLING: Your Honor, what about his statement to them when confronted with the tickets, the stubs, of well, I guess I do have luggage?

THE COURT: That's why I was so troubled by the concept that they know whose luggage it is.

MR. ZWERLING: Well, I mean isn't that -- I mean that's not only not a neutral situation, it's a positive claiming of the fact that he has the luggage that matches those stubs.

THE COURT: But if they know that he had what we might call title to or the right to possession of the luggage, that doesn't mean they know he's going to assert it. And it's important in Holloway. And Judge Tidy's fact-findings and Judge Barrow's opinion in Holloway make it important that that defendant didn't really say much of anything.

MR. ZWERLING: But here you have an individual who was prevented from getting in the taxicab while he was attempting to do it initially saying I don't have bags. Then when they find 2B, which has numbers on it and his name, he says yeah, I guess I have bags.

That is an admission that he has bags that match those claims.

THE COURT: I find that his overall message to the officers was he wasn't going near those bags. He was denying

anything to do with those bags and he was doing it clearly, I don't have anything to do with those bags.

Now, that's somewhat clouded and contradicted by the argument that you now make coupled with his later comment about you can't do that without a warrant, and there's a question of what is going on there, how custodial is this, how appropriate is any conversation they're then having.

But I find that he has conveyed to the officers two things: The physical act of departing the airport and going to the cabs; that is a part of their reasonable conclusion that he has denied ownership or has ceased to exert any expectation of privacy over those

And I frankly make that ruling very troubled by why once they have a U.S. attorney on the phone they don't just go ahead and get a warrant. But I'm going to leave that not decisive. What is decisive is the language of Holloway and the peculiar facts and circumstances of this case.

It's his going to the cab after clearly identifying the narcotics officers; his clear intent to leave the property of National Airport; his clear implied intent to abandon the bags, coupled with subsequent expressed disclaimers about it; his

expectation of privacy; therefore the opening of the bags does not cause suppression of the evidence.

MR. ZWERLING: Can I ask the Court to address one point that's troubling me about this? If the agents after talking to the U.S. attorney are ambiguous enough in their own minds as to whether or not they -- he had abandoned at that point his rights over that luggage, and he had to go back and --

THE COURT: That's why I asked Kahn the question, whose luggage did you think that was. And what if he'd said either way, yes, no or in between. I mean those were a couple of things I wanted to -- I wanted to extract from Kahn, what were you thinking when you went back to him. What were you going to do if he said yes, they're mine or didn't answer.

but I've resolved those facts with the way that I've tried to explain. What you're talking about is a part of the overall exclusionary rules underlying philosophy and that is, not just clearly improper police conduct should have a price paid against government and in favor of a defendant, whether he's guilty or not. But it also goes to the well-meaning officer who really is in doubt, and does the prophylactic concept mean

you just don't knock out evidence as a policy rule for wrong-doing officers, but you also tend to lean in favor of suppression against officers who could have clearly taken a more discreet cause of action, particularly when they've got the U.S. attorney on the other end of the phone.

That interchange with the prosecutor frankly caused me real problems, but I've resolved it the way I've resolved it. In that the officers prior to that point had had both the physical demonstration of relinquishment of the possession and rights to privacy, and they'd had express verbal relinquishment, too.

Therefore, the motion to suppress is denied. Interesting question, though, as to whether you are moving to suppress the statements made in the substation, the luggage or all of the above.

MR. ZWERLING: I think the Commonwealth is not going to try to use those statements.

MS. LAIR: We're in agreement on that, Your Honor.

THE COURT: All right. Thank you.

(Whereupon, at approximately 4:15 o'clock p.m., the hearing in the above-entitled matter was concluded.)

APPENDIX D

COMMONWEALTH OF VIRGINIA

VS CR93-197-98

BRIAN WECHSLER

THE 18th day of March, 1993 came the Commonwealth of Virginia, by its Attorney, Margaret Evelyn Lair, the Defendant pursuant to his recognizance and his Retained Attorneys, John Kenneth Zwerling and Lisa Kemler.

WHEREUPON this case came before the Court on the Defendant's "Motion to Suppress" and argument of counsel and sworn testimony were heard on same.

UPON CONSIDERATION WHEREOF it is the opinion of the Court that the Defendant's motion be and it hereby is denied.

THEREUPON the Court ordered that this case be and it hereby is continued to April 12, 1993 for trial by jury.

IT IS FURTHER ORDERED by the Court that the appearance bond herein remain in full force and effect.

Entered this 1st day of April 1993.

/s/ Paul F. Sheridan

JUDGE

APPENDIX E

Excerpt of Motion to Reconsider Hearing

July 16, 1993

denial of ownership is a denial of ownership. What his intentions were in denying ownership is his own business. But they go to -- a reasonable expectation of privacy, and when you say with baggage claims in front of you that those aren't your bags you are abandoning that property.

THE COURT: Well, I was somewhat troubled at the time. And it comes up on 94 and 95 of this transcript. What if the officers knew that they clearly were his bags even while he was denying it? But I struggled with that at the time we did this.

To what extent the abandonment by express denial that they're his is contradicted by a reasonable set of facts that tell the officers they really are his bags while he's standing there denying it. To what extent does his expression which could constitute abandonment get neutralized by the knowledge reasonably in front of the officers that is abandonment can't be real.

But I've resolved that. And I don't change my mind on that.

MS. LAIR: I'd just like for the Court to consider that the one argument that he reasserted, his right to ownership and privacy in his bags, is a moot point when you consider his final and definitive assertion that they are not his bags, and it wasn't until his assertion and the unequivocal response of the defendant when they asked -- when the agents asked are these your bags or aren't these your bags, he replied no.

And it wasn't until he said that that they opened up the bags.

THE COURT: Anything else?

MS. LAIR: No, Your Honor.

MR. ZWERLING: Just briefly --

MS. LAIR: He has one final motion but not on this --

THE COURT: Well, let me -- I'm reading from the transcript of 94 through 96 here, the dialogue I have with Mr. Zwerling and then the fact findings by the Court.

Page 97, line 16, the Court Reporter says that I said the word substant. Is that substantial, substantive, subsequent -- I can't interpret from the reading. But I don't believe I've

ever used the word substant either as counsel or as Judge, but whatever it means -- I was trying to explain the analysis factually there and I'm rereading it now.

(Pause.)

MR. ZWERLING: Page 120, Your Honor --

THE COURT: I'm also stopped on 106/107 where I'm talking to the Commonwealth attorney about why do they need to ask him whose bags they are.

(Pause.)

108, I make the comment, it'd be an easy question to decide if the defendant had kept quiet but the defendant repeatedly sent mixed messages, the dominant message though being those bags aren't mine.

Bottom 108, top 109, the question I was struggling with, to what extent can the defendant's claim of not having anything to do with the property overcome a reasonable belief in the officers' minds that they know it's his, for purposes of a warrant.

I reiterate at the bottom of 111, Mr. Zwerling, everybody knew whose bags they were. Or should have known.

Page 115, I make the fact finding that I accept the credibility of -- is it Agent Kahn?

MR. ZWERLING: Yes, Your Honor.

THE COURT: As to what his real state of mind was, it wasn't a subterfuge that was going on.

Judge Tidy in the case of Henrico at page 117, I made the reference, Judge Tidy did not accept the credibility of the officer.

And then I explain my fact findings on 120, 121. All the way to 123 I explain my fact findings and conclusions, interpretation of Holloway; Judge Barrow's opinion in Holloway, Judge Tidy's fact findings is referenced to.

Bottom of 123, line 16 through 22, I make a summary of certain fact findings. Page 125 I summarize the fact finding that the defendant had shown a physical -- this is line 7 -- a physical demonstration of relinquishment of the possession and rights to privacy and at line 9 they had expressed verbal relinquishment.

The motion to reconsider is denied.

MR. ZWERLING: I'm going to ask the court just to -- is that what I think the Court didn't focus on --

THE COURT: Was the state of mind of the defendant and his expectation of his property rights.

MR. ZWERLING: Number one. Number two, on page 80 and 81 of the transcript at the bottom, it says as we were walking to the terminal I stated, then you do have luggage. Excuse me, when I showed him the baggage tickets he said I guess I do have luggage.

So the last thing he said before they took him downstairs was yes, I do have luggage when they showed him the --

THE COURT: Top of 81.

MR. ZWERLING: Top of 81. Then the rest of the question has got to be excluded because it was in violation of his assertion of right to counsel. Except for when they bring the bags and they say, do you mind if we search these? And he says, not without a warrant.

It's my position that the very last thing that have that is legitimately available to them was a assertion, yes, I do have bags and that you can't go in those without a warrant. And that he had reasserted anything he may have abandoned prior to that time.

THE COURT: Abandonment can occur through conduct and statement equivocal in nature, where you can take a part of the physical pattern for one or several statements out of the collection and say that the person asserted ownership and/or an expectation of privacy and/or a possessory interest while the totality of information and conduct conveys reasonably abandonment.

I found abandonment. I still find it. it's a fascinating case, though.

MR. ZWERLING: Well, I hope we can get it to the Court of Appeals, Your Honor, without having to subject my client to a jury sentence.

THE COURT: A lot of Judges could disagree with that result reasonably.

MR. ZWERLING: Your Honor, we now have a motion for a pretrial ruling on the Code section, 18.2248.01. And the reason this is important to determine pretrial is because I need to know whether in order to get this case to the appellate courts I'm risking forty or seventy years of jury discretionary range on a sentence.

The statute in question has the language that it is to be considered a separate and distinct felony. I guess from any oth[illegible]elony, the Commonwealth doesn't refer to anything in particular. And then it sets a sentencing range of five to forty years.

Now, possession with intent is five to thirty under these circumstances. And I'd point out that

APPENDIX F

COMMONWEALTH OF VIRGINIA

VS CR93-197-98

BRIAN WECHSLER

THE 16th day of July, 1993 came the Commonwealth of Virginia, by its Attorney, Margaret E. Lair, the Defendant pursuant to his recognizance and his Retained Attorney, John Kenneth Zwerling.

WHEREUPON this case came before the Court on the Defendant's motion to reconsider this Court's previous decision denying the Defendant's motion to suppress, and argument of counsel was heard on same.

UPON CONSIDERATION WHEREOF, it is the opinion of the Court that the Defendant's motion be and it hereby is denied over the objection of the Defendant.

THEREUPON the Defendant, after being fully advised by his Attorney, personally waived his right to trial by jury and requested that the Court should hear and determine this case without intervention of a jury, and

IT APPEARING to the Court that the Commonwealth of Virginia objected to the waiver,

IT IS ACCORDINGLY ORDERED by the Court that this case be continued to July 26, 1993 for a jury trial.

IT IS FURTHER ORDERED by the Court that the appearance bond herein remain in full force and effect.

Entered this 10th day of August, 1993.

/s/ William Newman

JUDGE